In the Supreme Court

of the United States

OCTOBER TERM 1966

No. ~~720~~ 21

In the Matter of the Estate of

PAULINE SCHRADER, Deceased.

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE and HANS FUESSEL,

Appellants,

v.

WILLIAM J. MILLER, Administrator of the Estate of Pauline Schrader, Deceased, MARK O. HATFIELD, TOM McCALL and ROBERT W. STRAUB, respectively the Governor, Secretary of State and State Treasurer of Oregon, constituting the STATE LAND BOARD OF OREGON, and all persons unnamed or unknown having or claiming any interest in the Estate of Pauline Schrader, Deceased,

Appellees.

Appeal from the Supreme Court of the State of Oregon

APPELLANTS' REPLY TO MEMORANDUM FOR THE UNITED STATES

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Appellants' basic premise in this appeal has been that during the twenty years or so since *Clark* v. *Allen*, 331 U.S. 503 (1947) very material changes in conditions have occurred which warrant reconsideration of the constitutional issue there decided. That issue was whether or not California's application of

its reciprocal inheritance rights statute [Probate Code § 259], similar to but significantly less demanding than Oregon's ORS 111.070 here involved, was an unconstitutional extension of state power into the field of foreign relations.

In his Memorandum for the United States the Solicitor General takes the position that there have not been "changed conditions" to warrant reconsideration of the constitutional issue decided in *Clark* v. *Allen*, that no compelling reason for such reconsideration exists in the present case and he does not therefore urge plenary review. Presumably this conclusion is based primarily, if not wholly, upon the advices of the Department of State "that State reciprocity laws, including that of Oregon, have had little effect on the foreign relations and policy of this country" (Memo. 5). It is significant that the word is "*little*", not "*no*", so it is fair to say that there has been *some* discernible effect. That the discernible, identifiable effect may indeed be described as "little" does not detract from the cogency of Mr. Justice Douglas' quotation in his dissent in *Ioannou* v. *New York*, 371 U. S. 30, 31 (1962), from *United States* v. *Belmont*, 301 U.S. 324, 331 (1936) that

> "[*C*]*omplete* power over international affairs is in the national government and is not and cannot be subject to *any* curtailment or interference on the part of the several states." [emphasis ours]

Who is to measure, who, indeed, can measure precisely to what extent Oregon's confiscatory reciprocity

statute, with which we are here directly concerned, similar statutes of California, Montana, Iowa, Nebraska, etc., even the mild withholding statutes of the eastern states, such as New York, Pennsylvania, New Jersey, Massachusetts, etc., interfere with the national government's "complete power over international affairs"? The Department of State does concede at least a measure of such interference. Of equal cogency is the quotation in *Ioannou* [371 U.S. at 32] from *Hines* v. *Davidowitz*, 312 U.S. 52, 64:

> "Experience has shown that international controversies of the gravest moment, sometimes leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."

Even the mild, non-confiscatory restraints against actual transmission of inheritance funds to heirs in the so-called "Iron Curtain" countries practiced by New York surrogates under § 269-a of the New York Surrogate's Court Act were deemed to ". . . affect international relations in a persistent and subtle way." Reference was made to Chaitkin, The Rights of Residents of Russia and its Satellites to Share in Estates of American Decedents, 25 So. Calif. L. Rev. 297 (1951-2) [371 U.S. at 32].

A more recent article on the subject, entitled "Soviet Heirs in American Courts" by Professor Harold J. Berman of Harvard University, 62 Col. L. R. 257 (1962), relates numerous instances where probate judges, by highly uncomplimentary remarks about the governments or officials of the "Iron Curtain"

countries, made it clear that their decisions were motivated largely if not wholly by their personal views and sentiments.

Arbulich's Estate, 41 C.2d 86, 257 P.2d 433 (1953) is a typical, illustrative case. The presiding probate judge of the Superior Court in San Francisco ruled against reciprocity with Yugoslavia, held the testator's brother in Yugoslavia, who was the sole beneficiary, ineligible to inherit, and awarded the estate to another brother, living in San Francisco, who had been specifically disinherited in the will. The Ambassador of Yugoslavia to the United States, a cabinet minister and member of the Presidium of his country, personally appeared and testified at length in support of reciprocity [248 P.2d at 185], yet the judge on numerous occasions during the trial, again in his memorandum opinion and once again in his Findings expressed severely uncomplimentary views, some based on matters entirely outside the record, about Yugoslavia, its government and high officials [see 248 P.2d 189]. The District Court of Appeal reversed [248 P.2d 179] both on the evidence of reciprocity in fact and Article II of the U.S.-Serbian treaty of 1881 [22 Stat. 963] which, it was contended, provided for and guaranteed reciprocal inheritance rights between the two countries. However the California Supreme Court affirmed the Superior Court judgment, 41 C.2d 86, 257 P.2d 433, Mr. Justice Carter dissenting and adopting the District Court of Appeal opinion as his dissent [257 P.2d at 440]. [No. 344, Certiorari denied 346 U.S. 897, rehearing denied 347 U.S. 908].

In the later case of *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961) it was held that Article II of the U.S.-Serbian treaty of 1881 [22 Stat. 963] does in fact provide for reciprocal inheritance rights and requires the states to grant nationals of Yugoslavia the same inheritance rights as United States citizens but it may hardly be supposed that this comforted the testator Arbulich's brother in Yugoslavia who was deprived of his inheritance, nor repaired the damage to the relations between the United States and Yugoslavia which must inevitably have resulted from the conduct of the probate judge and the subsequent decision of the California Supreme Court. It should be pointed out that at Arbulich's death in 1947 the California reciprocity statute [§ 259 of the Probate Code] was not only much milder than Oregon's § 111.070 with which we are here concerned but actually included a presumption in favor of reciprocity which was conclusive and which cast the burden to prove the contrary upon anyone challenging it.

Reference has heretofore been made (J.S. 14) to *State Land Board of Oregon* v. *Pekarek*, 234 Or. 74, 378 P2d 734 (1963) in which the Oregon Supreme Court affirmed a probate court decree escheating to the state of Oregon an estate consisting of a savings account in a Portland, Oregon, bank, left there by a citizen resident of Czechoslovakia who died in Czechoslovakia and whose heirs were a son and daughter living in Czechoslovakia. There were introduced in evidence a certificate assuring the existence of reciprocity by the Ambassador of Czechoslovakia to the

United States and the personal testimony of the embassy's First Secretary [234 Or. at 80] but the credibility of these witnesses was judged in light of "the fact that declarations of government officials in communist-controlled countries as to the state of affairs existing within their borders do not always comport with the actual facts" (J.S. 15). Can it be doubted for a moment that relations between the United States and Czechoslovakia must have suffered from this taking away by the State of Oregon of the inheritance of the Czechoslovak decedent's son and daughter, and from the Oregon court's reflection on the integrity of its high officials?

Very reeently, on March 8, 1967, the California Supreme Court reversed [66 A.C. 74] a District Court of Appeal decision against reciprocity with Rumania in the *Chichernea Estate*, 244 A.C.A. 727, 53 Cal. Rptr. 535, (mentioned in J. S. 23). At this writing the California Supreme Court's opinion has not appeared in the reports but the clerk advises that the California Attorney General did not file a petition for rehearing, the time for which expired on March 23, 1967, so the decision has become final, just short of nine years after the testatrix' death on April 15, 1958. The Superior [probate] Court and the District Court of Appeal had ruled against reciprocity, denied the right to inherit of the testatrix' daughter, grandchildren, niece and son-in-law in Rumania and escheated the estate to the State of California.

For purposes here it is of interest that the Cali-

fornia Supreme Court rejected the construction of the reciprocity statute espoused by the state's Attorney General. He had contended that although the Legislature had in 1945 stricken from § 259 the requirement that an American heir have the right to receive payment within the United States of his foreign inheritance, such right was nevertheless required by reason of being an integral part of the right to take. This requirement is of course still in Oregon's § 111.070 (J. S. 6) as Section 1(1)(b) reading as follows:

> "b. Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country."

Quoting from p. 36 of the mimeographed opinion in *Chichernea* as filed March 8, 1967:

> "Entirely apart from the obvious impropriety of our interpreting section 259 so as to reintroduce into the statute a requirement expressly stricken by the legislature,[44] the construction espoused by the Attorney General would unsettle inheritance relations between California and many, perhaps even most, of the world's nations. The Rumanian law which is challenged as fatal to reciprocity in the present case[45] was a currency regulation imposed by the Fascist government of Rumania in 1941, in the setting of the Second World War. Nearly every nation in the world, including the United States, imposed such restrictions at that time. Few of these restrictions vanished with the end of the war; a major-

ity of nations preserved their currency regulations as they sought to rebuild their war-torn economies without unduly straining their balance of payments. Although Rumania revoked her ban (which was never more than discretionary) in 1959,[46] many nations still imposed discretionary, or in some cases absolute, restrictions upon the removal of estate proceeds. (See International Monetary Fund, Seventeenth Annual Report on Exchange Restrictions (1966).)

The restrictions vary widely in their terms, and many are obscurely phrased.[47] Surely this court cannot undertake to assess the nature and operation of all such restrictions in order to determine which are so onerous as to defeat reciprocity. For us to embark upon any such adventure *would gravely imperil the constitutionality of section* 259 *by involving our courts in matters of international monetary policy which may be within the exclusive province of federal authority.* (See Ioannou v. New York (1962) 371 U.S. 30 (Douglas, J., dissenting); Kolovrat v. Oregon (1961) 366 U.S. 187, 195-198; cf. Clark v. Allen (1947) 331 U.S. 503, 517.)

In any event, even if we were disposed to reintroduce into the statute *a possibly unconstitutional condition* expressly removed by our Legislature, we could hardly give that condition a more demanding construction than it bore when it was an express part of the Probate Code." (emphasis ours)

In *Estates of Larkin and Terry* (J.S. 22) 65 A.C. 49, 52 Cal. Rptr. 441 the court had previously expressed doubt of the constitutionality of the statute on another

point of construction espoused by the Attorney General. Quoting from 52 Cal. Rptr. at 488:

> "Moreover, a construction of section 259 which would charge our courts with the duty of assessing the 'democracy quotient' of foreign states and the degree to which they pursue foreign policies consistent with our own would imperil the constitutionality of the statute."

Thereafter followed a discussion of *Clark* v. *Allen* and the language quoted at J.S. 23.

Thus the California Supreme Court has twice recently expressed concern over the constitutionality of the reciprocity statute if they were to construe it as the state's Attorney General urged. No doubt the court was mindful of Section 2 of § 259 as originally enacted in 1941 which contained the following emergency clause:

> "A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and

> not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States."

This is the statute which the Attorney General of the United States in his brief in *Bevilacqua's Estate* so aptly described as "not an inheritance statute, but a statute of confiscation and retaliation." (App. Br. in Opp. to Motion to Dismiss or Affirm, p. 4)

Oregon's 111.070, the statute with which we are here concerned, enacted in 1951 as a revision of the original reciprocity statute, Chapter 399, Oregon Laws 1937, is practically identical in its first two requirements with California's original PC 259 as enacted in 1941, so it is reasonable to assume that the Oregon Legislature was motivated by the same goal of protecting the state from the foreign nations intent on seizing inheritances from Oregon for "war uses" or "war purposes"—a protective function, clearly and exclusively, of the federal government, not of any state government. And Oregon went even a step further by adding to ORS 111.070 the requirement in Section 1(1)(c) that the foreign heir: (J.S. 6)

> "may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries."

This, of course, is a very marked, important "change in conditions" as this requirement was not in the California statute before the Court in *Clark* v. *Allen*.

Clearly this would require the Oregon state courts, specifically in the first instance the probate courts, to examine into laws, decrees, regulations and other "acts of state" of foreign countries in violation of the doctrine laid down in *Underhill* v. *Hernandez*, 168 U.S. 250 (1897) at 252, quoted by Professor Louis Henkin in his treatise "The Foreign Affairs Power in the Federal Courts: Sabbantino" in 64 Columbia Law Review (1964) at page 807 as follows:

> "Every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment on the acts of the government of another done within its territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves,"

(App. Br. in Opp. to Motion to D. or A. p. 10).

While, from the standpoint of foreign relations, one may assume that Rumania is most gratified that the right of its nationals to inherit the Chichernea estate has at long last, and after years of most costly litigation, been vindicated, one may wonder at the impact on the relations between the United States and the U.S.S.R. of the fact that although in the Larkin and Terry estates, also the companion Yarovikoff estate [52 Cal. Rptr. 459] the right of the Russian heirs, again after years of most costly litigation, to inherit has been vindicated, only a few years previously the final decision was otherwise in *Gogabashvele's Estate*, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77.

There the testator's niece and nephew in the U.S.S.R., issue of a predeceased sister who had been named sole beneficiary in his will, were held ineligible, on a ruling against reciprocity, to inherit their uncle's sizable estate. There the District Court of Appeal did precisely what the California Supreme Court declined to do in *Larkin*, that is analyze in great detail and at great length, obviously on basis of a most voluminous record, the governmental structure of the Soviet Union, the courts of the Soviet Union, Soviet law found to be discriminating against aliens, "Wills and Intestacy in the Soviet Union", "Lack of Legal Rights in the Soviet Union", "secret laws", "unrepealed obsolete laws", the "recognition of *ex post facto laws*", etc., all leading to the conclusion that reciprocity did not exist as of decedent's death on August 14, 1956. [Note—in Larkin and Terry the deaths occurred in 1960].

One of the greatest vices in the attempted state regulation of the inheritance rights of aliens is that there can never be a final determination in respect to any particular nation even within the single state, much less among several states or all of the reciprocity states. This is because, firstly, it is uniformly held that the date of death, when vesting and the determination of all rights occurs, governs and so the law of the foreign country must be ascertained and adjudicated as of the date, actually as of the hour or instant of death, as a foreign law, or decree, or regulation might have gone into effect, or been invalidated, at a particular time which might be deemed determ-

inative of whether or not reciprocity existed at the date, the moment of the estate leaver's death. Although all aimed at the same goal and purpose, there are variations in the reciprocity statutes of the several states, so there may be a ruling for reciprocity under the particular wording and requirements of the California but not the Oregon or Montana or the Iowa or the Nebraska statute. And, as Professor Berman so effectively points out in 62 Col. L. R. 257 [supra], there is the human element—the personal views, convictions, temperaments, prejudices of the judges, particularly at the first, the probate court level. And, as Chaitkin points out in 25 So. Calif. L. Rev. 297 [supra] the outcome is dependent largely on the size of the estate in question, since the foreign heirs to small estates, for that matter even to substantial estates, may not be able to obtain the services of expert witnesses, of lawyers experienced in this field of the law, and to pay the staggering costs of years of litigation.

Professor Albert A. Ehrenzweig of the University of California in his "Treatise on the Conflict of laws" (1962) at page 668 points to the "host of inconsistent decisions" brought on by the reciprocity statutes and says that "Only outright abolition of these objectionable statutes can eliminate this expensive and demoralizing confusion." But that is wishful thinking and there is no time for that, even if it were attainable. With numerous state legislatures presently in session, the grave danger of proliferation in reciprocity statutes exists. There is, however, a simple, direct, im-

mediately effective way to remedy the deplorable situation which has developed over the twenty years since *Clark* v. *Allen*, and that is to place the regulation of the inheritance rights of non-resident aliens, if there must be such regulation for the benefit and protection of the country as a whole, where it rightfully and lawfully belongs and of necessity must be, in the charge of the federal government. To leave it to the fifty individual states to enact legislation, and the courts of the fifty individual states to determine what aliens may and what aliens may not inherit, is to invite ever-widening chaos which must, inevitably, result in resentment towards, eventually in retaliation against, this nation on the part of the governments whose nationals are denied their traditional, age-old rights of inheritance.

As pointed out by appellants in the Jurisdictional Statement at page 21, and again in Appellants' Brief in Opposition to Motion to Dismiss or Affirm at page 9, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) clearly points the way. For the same reasons that this Court held there [at p. 427] that "the scope of the act of state doctrine must be determined by federal law," and New York was denied the right to impose its own exception upon the application of the doctrine, individual states may not impose their own conditions and requirements for allowing some foreign nationals to inherit, or prohibit some, but not all, aliens to inherit. As pointed out in fn. 25 on page 427, various constitutional and statutory provisions there cited reflect "a concern for

uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jursdiction of federal institutions." Reference is there made to "Comment, The Act of State Doctrine—Its Relation to Private and Public International Law", 62 Col. L. Rev. 1278, 1297, n. 123, also to *United States* v. *Belmont* and *United States* v. *Pink*. Reference has been heretofore made to Professor Henkin's discussion of "The Foreign Affairs Power of the Federal Courts: Sabatino" in 64 Col. L. R. 805. Both authors strongly support the doctrine that the states must yield and the branches of the federal government must have jurisdiction where the foreign relations of the United States are involved. Mr. Justice Douglas declared the same doctrine in his dissenting opinion in *Ioannou* v. *New York* where he said [371 U.S. at 32] that:

> "Admittedly, the several states have traditionally regulated the descent and distribution of estates within their boundaries. This does not mean, however, that their regulations must be sustained if they impair the effective exercise of the nation's foreign policy."

It has, appellants respectfully submit, been clearly and amply demonstrated that Oregon's reciprocal inheritance rights statute, ORS 111.070 with which we are here concerned, and similar statutes in other states, such as California's Probate Code § 259, do impair the effective exercise of this nation's foreign policy as it concerns the "Iron Curtain" countries against whom said statutes are primarily and openly directed.

Each of the three requirements of ORS 111.070 compels the Oregon courts to inquire into and to sit in judgment on the ideology, the form of government, the laws, decrees, and other "acts of state" of the country in which the alien heir resides. If the court concludes that the constitution, inheritance laws, court decisions, etc., of the particular country do grant United States citizens rights of inheritance equal to those of their own citizens, thus satisfying the first requirement in Section 1(1)(a), the inquiry goes to the second requirement in 1(1)(b), which has nothing to do with reciprocity. The alien heir must show the court that United States Citizens have the right "to receive payment to them within the United States or its territories money originating from the estates of persons dying in such foreign country." This of course involves sitting in judgment on the foreign country's "acts of state" in the field of foreign exchange controls, management of its foreign valuta supplies, banking laws and regulations, and other facets of the country's fiscal structure, policies, and practices. In this connection the Oregon Supreme Court has repeatedly made it abundantly clear that in its view there can be no reciprocity with any foreign country which has in effect any form of foreign funds control —that is whose currency is not freely, completely and immediately convertible. Quoting from *Kasendorf's Estate* (1960) 222 Or. 463 at 479, 353 P.2d 531:

> "If the American heirs had to depend upon the uncertainties of the exchange laws to receive payment of their inheritances in the United

States, we would feel compelled, as we were in the Christoff and Stoich estates, to deny claimant's right to take from the Kasendorf estate."

As the California Supreme Court pointed out in *Chichernea* at page 36, this requirement, that is the United States citizen's right to receive payment of his foreign inheritance within the United States:

"... *which, because of widespread currency controls, would have precluded citizens of most foreign countries from participating in California estates* was eliminated by amendment in 1945."

However it remains in ORS 111.070 to this day, and effectively closes the door to heirs in all of the "Iron Curtain" countries who do exercise foreign funds controls. Strictly and impartially applied it would also bar heirs in all countries whose currencies are not freely, completely and immediately convertible into dollars, even though their foreign funds control may be under International Monetary Fund membership and regulation.

The third requirement also calls for the Oregon courts to inquire into and sit in judgment on acts of state of foreign governments. Section 1(1)(c) demands proof that the foreign heir:

"may receive the benefit, use or control of money or property from estates of persons dying in this state *without confiscation, in whole or in part, by the governments of such foreign countries.*" (emphasis ours)

In effect the foreign heir must prove a negative, that

is that his country does not wholly or partially confiscate his inheritance from Oregon. In *Pekarek's Estate*, 234 Or. 74, 378 P.2d 734 (1963), the Oregon Supreme Court, presumably in absence of any evidence of confiscation by the Czechoslovak government, concluded that Czechoslovakia's inclusion in Treasury Department Circular No. 655 was all that was necessary to make Czechoslovak heirs—and heirs in any other country on the list—ineligible to inherit in Oregon. As quoted from 234 Or. at 82 in J.S. 15:

> "This official determination was operative at the date of decedent's death. We regard this official declaration as evidence that foreign beneficiaries would not receive their interests free from control amounting to, at least, a partial confiscation."

Clearly, then, the Oregon reciprocal inheritance rights statute requires the Oregon courts to act in violation of, and they have in their reciprocal inheritance rights cases consistently violated, as shown by the decisions of the Oregon Supreme Court, two firmly settled principles of law, the act of state doctrine, as most recently declared in *Sabbatino*, and the prohibition, as declared in *Underhill* v. *Hernandez* [supra] against sitting in judgment on the acts of the government of another country done within its territory.

There are directly applicable to this case the principles of law involved and applied in *Cunard S. S. Co.* v. *Lucci*, 92 N.J. Super. 148, 222 A.2d 522, in which a state statute prohibiting the advertising of passage upon a vessel unless the advertising matter clearly in-

dicated the country of the vessel's registry was held unconstitutional as it impinged on areas reserved to the Federal Government under the supremacy clause. Quoting briefly from 222 A.2d at 529:

> "Primarily, the subject area sought to be affected by this legislation is national in scope, thereby necessarily requiring uniformity of regulation" [citing Cooley v. Board of Wardens, etc. 53 U.S. 299 (1851).]

and from p. 530:

> "I further conclude that the statute in question also offends another area of federal pre-emption—the foreign affairs power. Clearly, that power is reserved to the federal Executive, and it, in conjunction with the supremacy clause, bars parallel state activity." [citing]
>
> * * * * *
>
> "The field of international affairs is one requiring sensitive and delicate negotiations. It should be obvious that *state action that might interfere* with the balance of international relationships could only serve to encumber hopelessly the prerogatives of both the Executive and Congress with respect to this subject matter; this must be regarded as so notwithstanding the good intentions of the legislature of any state. The legislatures of individual states or of the several states cannot determine foreign policy, nor can they provide interest groups or individuals with that right. The statute here under review seeks to speak in this forbidden area. It cannot be permitted to do so." (emphasis ours)

Every word of this applies directly to ORS 111.070, to

the attempts of individual states to lay down conditions which foreign nations must meet in order to qualify their nationals to inherit in those states. The mischief, the damage to the foreign relations of the United States which has been or *might* be done has been glaringly demonstrated. The potential for further mischief, for further intrusion by the states into the field of foreign relations in the future is limitless. This is an area which necessarily requires uniformity of regulation which can only be achieved by the Federal Government.

Substantial federal questions of the greatest and gravest public importance and urgency are presented in this case and appellants again pray that jurisdiction be noted and this case set for plenary consideration.

Respectfully submitted,

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